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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1026

STANLEY BLUMENTHAL, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 17-24) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1963 (Pet. 24). The petition for a writ of certiorari was filed on April 15, 1963. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254 and 47 U.S.C. 402(j).

QUESTIONS PRESENTED

The Federal Communications Commission, preliminary to passing upon petitioners' applications for radio operator licenses, asked them whether they were or had ever been members of the Communist Party. An affirmative answer to the question, in whole or in part, would not itself have disqualified the applicant from receiving a license; he would still have been entitled to a hearing (with the right to confrontation and cross-examination) to determine whether, on the basis of all the facts, grant of the license would be in the public interest. The petitioners stated that they were not then members of the Communist Party, but declined to answer whether they had ever been members—two of them basing their refusal to answer on the Fifth Amendment. The Commission dismissed the applications without considering the merits because of petitioners' failure to answer the questions completely. The following questions are presented:

1. Whether the Commission, to aid it in determining whether the grant of an application for a radio operator's license would serve the public interest, may require the applicant to furnish information about his past membership in the Communist Party.

2. Whether petitioners' rights under the First and Fifth Amendments were violated by dismissal of their license applications for failure to furnish such information.

STATUTE AND REGULATIONS INVOLVED

Pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*) are set forth in the petition (Pet. 3-4). The relevant portions of the Commission's Rules and Regulations are set forth in the Appendix, *infra*, pp. 16-17.

STATEMENT

A. *Petitioners Blumenthal and Jones*

Petitioners Blumenthal and Jones filed with the Federal Communications Commission, in February and March, 1962, applications for first-class radio telephone and second-class radio telegraph operator licenses (J.A. 12a-15a).[1] Their applications were accompanied by a questionnaire[2] containing the fol-

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[1] "J.A." refers to the joint appendix in the court of appeals.

[2] On December 1, 1961, the Commission had dismissed Jones' and Blumenthal's applications for renewal of operator's licenses after a hearing on the propriety of their refusal to answer questions relating to their membership in the Communist Party or groups advocating the violent overthrow of the United States. Both petitioners relied on grounds of constitutional privilege and lack of Commission authority in refusing to answer. The Commission held that the lack of this information precluded it from determining whether the grant of the applications would be in the public interest, and dismissed the applications without any determination on the merits. *Stanley Blumenthal, et al.*, 31 F.C.C. 1003, 1006. Petitioners appealed to the Court of Appeals for the District of Columbia Circuit. *Blumenthal* v. *Federal Communications Commission*, Case #16800 (C.A. D.C.). That case was dismissed on March 15, 1962, after petitioners had

lowing questions (J.A. 4a-5a):

> 1. Are you now or have you ever been a member of the Communist Party?
> 2. Are you now or have you ever been a member of any organization which advocates or teaches the overthrow of the Government of the United States, or of any political subdivision thereof, by force or violence?

Blumenthal answered the first question as follows (J.A. 4a):

> I am not a member of the Communist Party and was not at the time I applied for a renewal of my second-class radiotelegraph operator's license in 1958. As to the period prior to that date, I decline to answer in accordance with the privileges granted to me under the Fifth Amendment to the Constitution of the United States.

Petitioner Jones answered the first question (J.A. 5a):

> I am not a member of the Communist Party and was not at the time I was first requested to execute a questionnaire by the Commission.

Both petitioners answered the second question in the negative (J.A. 4a-5a). In addition, each appended a statement challenging the authority of the Commission to ask the questions (*ibid.*)

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abandoned their renewal applications and had filed new applications with an attached questionnaire which anticipated the Commission's request for this information.

The Commission wrote both petitioners, requesting that they completely answer the questionnaire, and pointing out that the applications would be subject to dismissal pursuant to Section 1.71(d) of the Commission's Rules, 47 CFR 1.71(d), if they failed to respond (J.A. 12a-15a).[3] Petitioners declined to complete their answers and requested a hearing (J.A. 18a). The Commission denied the request on the ground that both petitioners had been afforded a full hearing on the legality of their refusals to answer the same questions in connection with their earlier applications for renewal of their operators' permits (see note 2, *supra*) (J.A. 18a-19a). The Commission granted the petitioners additional time to respond (J.A. 19a), and, upon their failure to do so, dismissed their applications (J.A. 7a-9a).

B. *Petitioner Paschal*

Paschal applied for renewal of his advanced amateur station and operator license (J.A. 16a). The Commission asked Paschal to supply additional information and requested that he respond to the same questions asked of Blumenthal and Jones (*ibid.*). Paschal challenged the statutory authority of the Commission to ask the questions and answered both questions as follows (J.A. 6a):

> I am not a member of the Communist Party. In view of the manner in which existing legisla-

[3] Section 1.71(d) provides in pertinent part that failure to respond to a request for additional information will be cause for dismissal of an application. The dismissal is without prejudice where the application has not been designated for hearing.

> tion has been utilized and the attitude of various governmental agencies in prosecuting and persecuting by defacto fiat, I must utilize my right under the Fifth Amendment of the Constitution to refuse to give comfort or aid to any inquisitorial activity regarding any past or present political activity.

The Commission again asked Paschal to answer the questions. It set forth its authority to require such information, and explained that membership in the Communist Party would not necessarily disqualify him, but was one of many pertinent facts and circumstances which it would take into account (J.A. 20a-22a). Paschal did not reply and the Commission dismissed his application (J.A. 10a-11a).

C. *The Decision of the Court of Appeals*

The court of appeals (Judges Fahy and Wright, Chief Judge Bazelon concurring) affirmed (Pet. 17-23). The court held that its earlier decisions in *Borrow* v. *Federal Communications Commission*, 285 F. 2d 666, certiorari denied, 364 U.S. 892, and *Cronan* v. *Federal Communications Commission*, 285 F. 2d 288, certiorari denied, 366 U.S. 904, established that the Commission had authority to seek the information, and that dismissal of the applications for failure to supply it did not violate petitioners' First Amendment rights. The court ruled that although petitioners were justified in relying on the Fifth Amendment in refusing to answer the question, the Commission was justified in dismissing the applications because of petitioners' failure to furnish relevant information. It stated (Pet. 22):

> The agency cannot be required to act without the information. To hold otherwise would carry the privilege beyond its purpose. While its invocation may not be considered ground for disqualification, for the privilege is available to the innocent as well as to the non-innocent, the lack of relevant information which follows in the wake of its assertion leaves a gap in data which the applicant can supply. The effect is the same whether the refusal to supply it is based on the Fifth Amendment or on an unfounded claim under the Fourteenth Amendment. [footnote omitted]

ARGUMENT

The petition presents only the narrow issue whether the Federal Communications Commission may require an applicant for a radio operator's license to furnish information concerning his past membership in the Communist Party. Under the Commission's regulations and practice the fact that an applicant had been a Party member would not itself disqualify him from receiving a license, but would be merely one factor which the Commission would consider in determining whether he is qualified and whether grant of the application would be in the public interest. *Travis Lafferty*, 23 F.C.C. 761, 765-766. If any petitioner had answered the question affirmatively, he would have had the right to a full hearing, with confrontation and cross-examination, to develop all pertinent facts to show that a grant of a license to him would serve the public interest. *Lafferty*, *supra*, 23 F.C.C. at 770; *Morton Borrow*, 27 F.C.C.

783, 789, 790.[4] But since petitioners did not supply the information, there is no occasion to consider the weight which the Commission may give to past membership in the Communist Party in passing upon applications for radio operators' licenses. Petitioners must establish that the Commission had no authority to obtain the information in question for purposes of determining the underlying public interest question. We submit that the court of appeals correctly held that the Commission was justified in dismissing the applications because of petitioners' refusal to answer the question, and that such dismissals did not violate their rights under the First or Fifth Amendments.[5]

1. The Communications Act plainly authorizes the Commission to require applicants for radio operators' licenses to furnish information about Communist Party membership. Section 303(l) authorizes the Commission to "prescribe the qualifications of station operators" and to issue licenses to such "qualified"

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[4] In hearings of this nature, in order that the applicant will be "completely and thoroughly informed as to the evidentiary showing" which he will be required to meet, the Commission places on its counsel the burden of going forward with the evidence against the applicant, and requires the applicant "to refute specifically only those matters on which probative evidence was already introduced" by Commission counsel. *Dispatch, Inc.*, 13 Pike & Fischer, R.R. 237, 244.

[5] Since petitioner Jones did not rely on the Fifth Amendment in refusing to answer the questions, he cannot now rely on that Amendment as a justification for his refusal to answer. *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 107.

applicants "as public convenience, interest or necessity requires." The Commission has provided by regulation that an applicant must be found "qualified in respect to citizenship, character, and physical condition" (Section 1.71(a), Rules of the Federal Communications Commission, 47 CFR 1.71(a)). When read in the light of the congressional purposes in the Communications Act of furthering the "national defense" and "promoting safety of life and property" (47 U.S.C. 151), these provisions fully support the Commission's position that Communist Party membership (both past and present) of a radio operator is a relevant factor to consider in determining whether grant of a particular application would serve the public interest.

Commission-licensed radio operators occupy a strategic position in relation to the vital channels of radio communication and have opportunity to take action seriously detrimental to the public welfare. See *Didriksen* v. *Federal Communications Commission*, 254 F. 2d 354, 356 (C.A. D.C.); *Morton Borrow*, 27 F.C.C. 783, 787-788. As the court below explained in the *Borrow* case, which upheld the Commission's authority to require information as to past or present membership in the Communist Party or in an organization advocating or teaching the overthrow of the government by force or violence (285 F. 2d 666, 668-669):

> Radio beams are the operational essence of quick modern communication and of the control of modern weapons. Not only the power to

> use these electronic devices but the power to interfere with waves being used by others should, it might properly seem to the Commission, be lodged in those whose loyalty to the United States is made to appear.

The court there also stated (*id.*, p. 670):

> Membership in the Party *vel non* is a proper introductory query in this area; the answer may dispose of the subject, or it may necessitate explanation which, in turn, may or may not be acceptable.

Because of the crucial role which radio operators thus occupy in sensitive areas involving national defense, the present case is well within the principles applied in *Beilan* v. *Board of Education*, 357 U.S. 399, 405; *Adler* v. *Board of Education*, 342 U.S. 485, 493; and *Garner* v. *Los Angeles Board*, 341 U.S. 716, 720, which upheld the relevancy of Communist Party membership in determining the "competency" or "fitness" of a teacher (*Beilan* and *Adler*) or the "reliability" of a subway operator. *Lerner* v. *Casey*, 357 U.S. 468, 473-475.

Past Party membership is also a pertinent factor for the Commission to consider in determining whether an applicant is qualified and whether grant of his application would serve the public interest. Its significance, of course, depends upon all the facts of a particular case—when the applicant joined the Party, in what circumstances, how long he remained a member, why and when he quit, how familiar he was with and how committed he was to the Party's prin-

ciples, and his present attitude toward the Party and its objectives. Past conduct with respect to Party membership "provides the illuminating context within which the implications of present conduct may be known" (*Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 69). If, for example, a particular applicant had quit the Party just before filing his application, that fact would certainly be relevant for the Commission to consider in passing upon the application.

Once it is recognized that information about past Party membership is pertinent to the Commission's decision on licensing applications, it necessarily follows that the Commission may require an applicant to submit such information and, if he fails to do so, may dismiss the application without determining its merits. In a particular case the Commission, upon obtaining all the facts, may conclude that despite past membership the grant of a license would be in the public interest. But the Commission, before it makes such a determination, is certainly entitled to obtain all information which bears upon the question.

Petitioners err in contending (Pet. 9-11) that the Commission and the Congress have recognized that the Commission cannot consider Communist Party membership in radio operator licensing proceedings. Indeed, the Commission took the contrary position before Congress in 1958, and Congress apparently acquiesced in that view. Section 303(l) was amended in 1958 to authorize the Commission to waive the statutory requirement, that station operators must be citizens, for non-citizens holding United States or

foreign aircraft pilot certificates. The House had proposed to require the Commission to find "that security considerations have been satisfied" before waiving the citizenship requirements. The Commission opposed this provision as unnecessary, on the ground that

> The Commission has previously interpreted public interest as encompassing authority to examine the character qualifications of persons seeking radio operators licenses and, where information is brought to our attention which might show that the issuance of such license would jeopardize the security of the United States, as authorizing this agency to refuse to issue such license. * * * The present statute requiring a license be issued only upon a finding that its issuance is in the public interest is sufficient to permit this Commission to deny license applications in those cases where security questions are involved, without requiring it to undertake the responsibility of making affirmative findings with respect to the security qualifications of each applicant which comes before it. [S. Rep. No. 2338, 85th Cong., 2d Sess., p. 5.]

The Senate Committee rejected the proposal, stating that its action did not relieve the Commission of its responsibility to "weigh the character qualifications" of applicants for radio operator licenses (*id.*, p. 3).

2. The fact that the refusal of two of the petitioners to furnish the relevant information was rested on a Fifth Amendment claim of privilege does not invalidate the Commission's dismissal of their applications for failure to supply the information. For

once it is established that the information sought is relevant to the Commission's exercise of its statutory duties under Section 303(l) and within the Commission's authority to obtain, it is immaterial whether the refusal to supply it was based on a Fifth Amendment claim or some other ground. As the court of appeals pointed out (Pet. 22), whatever the reason on which such refusal is based, it results in a "lack of relevant information * * * which the Commission is authorized to seek." The Commission was therefore justified in dismissing the applications for failure to supply necessary information.

In the present case, unlike *Konigsberg* v. *State Bar of California*, 353 U.S. 252, on which petitioners rely (Pet. 14), no adverse inference was drawn from the Fifth Amendment claim, and the Commission did not decide the merits of petitioners' applications. See *Morton Borrow*, 27 F.C.C. 783, 789, 790. It dismissed the applications solely because petitioners had failed to supply information which it needed in

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[*] The Commission there made clear that the "failure to reply is not utilized as * * * the basis of an adverse finding, but is of significance insofar as it prevents the Commission from making an affirmative finding that a grant of the application would be in the public interest as required by the act." *Morton Borrow*, 27 F.C.C. 783, 787, 789, 790. It further explained (*id.*, at 789) that where the Commission has doubts as to an applicant's qualifications, "it would be remiss in its duty if it failed to conduct such investigatory proceeding as its facilities permit before affirmatively concluding, as required by the act, that a grant of the application would be in the public interest" and that a "failure to respond to the Commission's interrogation deprives the Commission of facts on which to base the necessary" statutory conclusion.

order to determine whether their grant would be in the public interest. Cf. *Orloff* v. *Willoughby*, 345 U.S. 83, where the Court upheld the action of the President in denying an Army commission to a doctor, otherwise qualified, because he refused to answer questions about his membership in the Communist Party and other organizations under a claim of privilege. The Court stated (p. 91) that the President "before certifying his confidence in an officer and appointing him to a commissioned rank, has the right to learn whatever facts the President thinks may affect his fitness." See also *Kimm* v. *Rosenberg*, 363 U.S. 405; cf. *Nelson* v. *County of Los Angeles*, 362 U.S. 1; *Cohen* v. *Hurley*, 366 U.S. 117.

While it is of course true, as petitioners point out (Pet. 13), that their claim of the privilege subjected them to a disability not suffered by applicants who answer the question, this is no ground for denying the Commission the right to obtain information which it requires in the performance of its licensing function. There are many situations in which a valid invocation of the privilege may subject the person claiming it to a subsequent disadvantage; this fact, however, does not preclude asking the question against which the privilege is invoked. See, *e.g.*, the *Orloff* and *Kimm* cases, *supra*; see also *Kaufman* v. *Hurwitz*, 176 F. 2d 210 (C.A. 4) (discharge in bankruptcy denied to person who, under claim of privilege, refused to answer questions material to the statutory grounds for discharge).

3. Petitioners also contend (Pet. 2, 12) that the dismissal of their applications violated their First

Amendment rights. This point was fully considered and rejected in *Borrow* (285 F. 2d at 670), and the arguments made in our brief in opposition there are equally applicable here. See our brief in opposition in *Borrow*, No. 403, 1960 Term, pp. 19-20; see also, *American Communications Association* v. *Douds*, 339 U.S. 382, 391, 412; *Speiser* v. *Randall*, 357 U.S. 513, 527; *Beilan* v. *Board of Education*, 357 U.S. 399, 405.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1963.

APPENDIX

47 C.F.R.

§ 1.71 *Procedure with respect to commercial radio operator license applications.* (a) Upon acceptance for filing of an application for a new commercial operator license, an examination is conducted, where required, by the field office with which the application is filed in accordance with Part 13 of this chapter. If applicant passes the examination and is found qualified in respect to citizenship, character, and physical condition, the license will be issued. Where doubts as to citizenship, character, or physical condition arise, the application is referred to the Commission's Inspection and Examination Division, Field Engineering and Monitoring Bureau, Washington, D.C., for consideration. If it appears that further information is required to determine the applicant's qualifications or that a grant of the application will not serve the public interest, the applicant will be notified in writing and given an opportunity to furnish such written showings as the Commission may request and as the applicant may desire to submit. If, from the information furnished, it does not appear that the applicant is qualified or that the public interest would be served by a grant of the application, the applicant will be advised thereof in writing and given the opportunity to request, within the period of time to be specified in such writing, that the application be set for hearing. In case of failure timely to request such hearing, the application will be denied.

(b) Where an examination is not required, the application will be handled with respect to

other matters in accordance with the procedure in paragraph (a) of this section.

(c) Applications for renewal of license after acceptance for filing are handled in accordance with the procedure contained in paragraph (a) of this section, except that no examination is required unless the circumstances as set forth in § 13.28 of this chapter exist, in which case a renewal examination will be required.

(d) Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. Such dismissal will be without prejudice where an application has not yet been designated for hearing; such dismissal may be made with prejudice after an application has been designated for hearing.

* * * * *

§ 1.506 *Dismissal of applications.* (a) Any application may, upon written request signed by the applicant or his attorney, be dismissed without prejudice as a matter of right prior to the designation of such application for hearing.

(b) Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. Such dismissal will be without prejudice where an application has not yet been designated for a hearing; such dismissal may be with prejudice after an application has been designated for a hearing.

(c) Requests to dismiss an application without prejudice after it has been designated for hearing will be considered only upon written petition properly served upon all parties of rec-

ord and will be granted only for good cause shown. Such petition must be accompanied by the affidavit of a person with knowledge of the facts as to whether or not consideration has been promised to or received by petitioner, directly or indirectly, in connection with the filing of such petition for dismissal of the application.